



DATE ISSUED: May 31, 1989

CASE NO. 88-INA-302

IN THE MATTER OF THE APPLICATION  
FOR AN ALIEN EMPLOYMENT CERTIFI-  
CATION UNDER THE IMMIGRATION AND  
NATIONALITY ACT

RON HARTGROVE, INC.  
Employer

on behalf of

KEVIN P. CREMIN  
Alien

Adan G. Vega, Esq.  
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; Brenner, Guill, Tureck, and  
Williams, Administrative Law Judges

NAHUM LITT  
Chief Judge

DECISION AND ORDER

This matter arises from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1982). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).<sup>1</sup>

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the

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<sup>1</sup> All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

time of the application for a visa and admission into the United States and at the place where the alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (A1-A35), and any written arguments of the parties. See §656.27(c).

### Statement of the Case

On March 3, 1987, the Employer filed an application for alien certification to enable the Alien to fill the position of master platinumsmith. (A33-A35). The Employer, which is located Houston, Texas, is a manufacturer of fine jewelry. (A33).

The requirements of the job included a Bachelors of Arts Degree or equivalent in jewelry manufacturing or art and design, with two years experience in the job offered or four years experience as a precious metal jewelry designer and fabricator. (A33). The duties as described in item 13 of ETA 750 included: utilizing platinum to design and fabricate articles of fine jewelry to an international standard, interpret drawings, hand make wire, basket, and bezel settings for precious stones; utilizing stone setting methods including pave, bead, channel, prong, bezel and hammer techniques; forming platinum and gold using forging, chasing, repousse and raising techniques; hand engraving and carving figurative and non figurative designs; performing model making, mold making, and centrifugal casting, applique, granulation, surface decoration techniques, finishing and polishing. (A33).

On October 30, 1987 the CO issued a Notice of Finding. (A14). Citing §656.21(b)(7), the CO stated that U.S. applicant David Singleton meets the minimum qualifications for the position; his resume shows a B.F.A. degree and more than four years experience as a precious metal jewelry designer and fabricator. (A14). The Employer was required to reconsider Mr. Singleton for the job or document that he was not rejected for other than job related reasons. (A14).

In its rebuttal, the Employer stated that Mr. Singleton was not qualified for the job for the following reasons: he had no experience in figurative repousse in metal, he had no experience in hand engraving of figurative and non-figurative carvings, he had only elementary experience in high platinum construction, he could not execute complicated and sophisticated high fashion designs, he had elementary experience in fabrication of complex modular-type prototype models, he had little to no experience building 18k yellow gold and platinum pieces which comprised a major portion of its work. (All-A12).

On February 26, 1988, the CO denied certification. (A7).

An employer's self-serving, unattested statement is insufficient, unless supported by other documentation, to establish that the U.S. worker did not meet the actual minimum requirements and was not rejected for other than lawful, job-related reasons. The employer's rejection of the U.S. worker for not meeting additional requirements that maybe should have been, but were not, included in the job opportunity as "other special requirements" has no merit. The U.S. worker does meet the minimum requirements for the job opportunity, as described. (A8). (emphasis in original).

The CO concluded that the Employer had not complied with the instructions in the Notice of Findings, and had not established that there are not sufficient able, willing, qualified, and available U.S. workers. (A8).

On March 24, 1988, the Employer requested review arguing that the U.S. applicant was not qualified for the position. (A4-A5).

#### Discussion and Conclusion

The CO denied certification on the ground that the Employer failed to document lawful, job-related reasons for rejecting each U.S. worker. According to the CO, Mr. Stapleton met the Employer's stated minimum requirements for the position and was unlawfully rejected by the Employer.

In Ashbrook-Simon-Hartley v. McLaughlin, 863 F.2d 410 (5th Cir. 1989), the Court of Appeals for the Fifth Circuit held that the Department of Labor "'cannot narrow its inquiry to the single question of whether the U.S. worker applicant has a certain number of years of education, training, or experience," rather, it must "inquire whether a domestic applicant is able to perform the job duties." Id. at 415-416. In that case, the employer sought to fill to the position of design engineer supervisor. The employer required two years experience in the job offered or four years experience as a mechanical design engineer. A U.S. worker was rejected because although he had four years experience as a mechanical design engineer, the employer concluded that he was unable to perform the job duties. The administrative law judge held that since the U.S. worker met the stated minimum requirements, the employer did not reject him for lawful, job-related reasons. The Court of Appeals reversed, holding that the Department of Labor cannot "ignore the job duties listed by the employer when determining whether the employer has a job-related reason for rejecting a domestic applicant." Id. at 416.

In the instant case, which arises in the Fifth Circuit, the Employer has required two years of experience in the job offered or four years experience as a precious metal jewelry designer and fabricator. Mr. Singleton was rejected because although he had four years experience as a jewelry designer and fabricator, the employer concluded that he was unable to perform the job duties. Pursuant to the Court of Appeals' holding in Ashbrook, supra, this matter must be remanded to

the CO to consider the job duties as described by the Employer in determining whether the Employer rejected Mr. Singleton for a lawful, job-related reason.

On remand the CO must consider the Employer's evidence in rebuttal to the Notice of Findings, pursuant to our holding in In re Gencorp, 87 INA 659 (Jan. 13, 1988), and determine whether the U.S. worker is able to perform the job duties as described by the Employer. Also pursuant to Ashbrook, the CO may inquire as to whether the Alien could perform the job duties at the time he was hired by the Employer for the same or similar jobs. If the CO determines that the U.S. worker is qualified for the position, the Employer must be given an opportunity to submit evidence in rebuttal.

### ORDER

The Final Determination of the Certifying Officer denying certification is hereby VACATED, and the matter is REMANDED for further action consistent with this decision.

NAHUM LITT  
Chief Administrative Law Judge

NL:AS